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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREENWOOD TRUST COMPANY,
Petitioner,

v.

JAMES HUNTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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Pursuant to Supreme Court Rule 15.8, Petitioner Greenwood Trust Company ("Greenwood") submits this Second Supplemental Brief to apprise the Court of a significant new decision rendered by the Court of Appeals for the Third Circuit concerning the issue raised in Greenwood's Petition for a Writ of Certiorari.

On December 29, 1995, the Third Circuit held that credit card late charges are "interest" under Section 85 of the National Bank Act ("NBA"). *Spellman v. Meridian Bank (Delaware),* Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 at *56 to *68 (3d Cir. Dec. 29, 1995). Unlike the New Jersey Supreme Court, the Third Circuit specifically

rejected the argument that the term "interest" in Section 85 "can only apply to charges in the form of periodic percentage rates," declaring that "we do not believe the term is either so limited in meaning or so self-defining." *Id.* at *56. Instead, the Third Circuit relied upon this Court's decision in *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 185 (1872), which defined "interest" as "the compensation. . . for the use or forbearance of money, or as damages for its detention." The Third Circuit found that late charges fit comfortably within this definition.

The Third Circuit's recent decision creates yet another conflict with the New Jersey Supreme Court's unprecedented decision in this case that can be resolved only by this Court's grant of a writ of certiorari. The New Jersey Supreme Court's decision that late charges are not "interest" under Section 27 of the Federal Deposit Insurance Act ("FDIA") and Section 85 of the NBA squarely conflicts not only with the Third Circuit decision, but also with decisions by the Court of Appeals for the First Circuit, the California Supreme Court, and the Colorado Supreme Court. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993); *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *petition for certiorari pending*, No. 95-860 (filed Nov. 30, 1995); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr. 2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal. Rptr. 2d 748 (Cal. 1995), *petition for certiorari pending*, No. 95-951 (U.S. Dec. 18, 1995); *Stoorman v. Greenwood Trust Co.*, No. 94 SC 382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995); *Copeland v. MBNA America Bank, N.A.*, No. 94 SC 409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for certiorari pending*, No. 95-1056 (U.S. Dec. 28, 1995); *Richardson v. Citibank (South Dakota), N.A.*, No. 94 SC 670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995).

Moreover, as discussed in Greenwood's Petition for a Writ of Certiorari (pp. 11-13), the New Jersey Supreme Court's decision in this case also conflicts with the statutory interpretations of five different federal banking agencies.

The pressing need for Supreme Court resolution of the many conflicts created by the New Jersey Supreme Court's decision is vividly illustrated by the sharp conflicts now existing within the Third Circuit itself regarding the question of whether late charges are "interest" under Section 85 of the NBA and Section 27 of the FDIA. Although the Third Circuit has answered that question in the affirmative, directly contrary decisions were previously rendered by the New Jersey Supreme Court and by the intermediate appellate court in Pennsylvania. *Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *allocatur granted*, 659 A.2d 557 (Pa. May 25, 1995); *In re: Citibank (South Dakota) Credit Card Litigation*, 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted*, 659 A.2d 984 (Pa. May 31, 1995); *Gadon v. The Chase Manhattan Bank (USA)*, 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending).

Thus, for banks and borrowers who are located in or doing business in New Jersey and Pennsylvania, the meaning of "interest" in Section 27 of the FDIA and Section 85 of the NBA turns solely on the happenstance of whether suit is brought in federal court or state court. By the same token, national credit card issuers such as Greenwood are also confronted with conflicts on a national level concerning the legality of their interstate exportation of late charges — while that practice has been judicially approved by the First Circuit, Third Circuit, and the highest courts of California and Colorado, it has been declared illegal by the New Jersey Supreme Court and Pennsylvania intermediate appellate court.

Given the vast sums of money involved, it is of paramount importance that there be uniformity and predictability with respect to the meaning of "interest" in Section 27 of the FDIA. That can be achieved only by the grant of a writ of certiorari by this Court.

Respectfully submitted,

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